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November 20, 2001

OFFICE OF THE
EXECUTIVE SECRETARY

VIA HAND DELIVERY

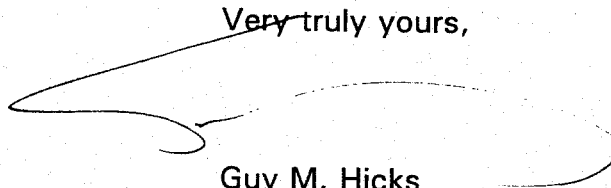
Mr. David Waddell, Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37243

Re: *Docket to Determine the Compliance of BellSouth
Telecommunications, Inc.'s Operations Support Systems with State
and Federal Regulations*
Docket No. 01-00362

Dear Mr. Waddell:

Enclosed are fourteen copies of BellSouth's Motion to Clarify Order Regarding AT&T Interrogatory No. 36. Copies of the enclosed have been provided to counsel of record.

Very truly yours,



Guy M. Hicks

GMH/jej

Enclosure

**BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE**

In Re: *Docket to Determine the Compliance of BellSouth Telecommunications, Inc.'s Operations Support Systems with State and Federal Regulations*

Docket No. 01-00362

**MOTION TO CLARIFY ORDER REGARDING
AT&T INTERROGATORY NO. 36**

Late on the afternoon of Friday, November 16, 2001, BellSouth Telecommunications, Inc. ("BellSouth") received the Hearing Officer's Order Resolving Procedural Motions ("Order"). That Order states, with respect to AT&T's Interrogatory 36, that BellSouth is ordered to provide no later than Tuesday, November 20, 2001,

the achieved flow-through rate and the CLEC error excluded flow-through rate for each individual state in BellSouth's region and for the BellSouth region in total for the following categories: (a) LNP; (b) UNE; (c) Business Resale; (d) Residential Resale; and (e) Total (*i.e.*, UNE, Business Resale and Residential Resale combined). See page 27 of Order.

This is inconsistent with the ruling made by the Hearing Officer with respect to Interrogatory No. 36 during the November 8, 2001 Pre-Hearing Conference. The Order also is contrary to state discovery law in that it requires BellSouth to do extensive programming and create documents not already in existence. Finally, even if it were technically feasible to generate these reports, it is absolutely impossible to do so on one business day's notice.

During the November 8th Pre-Hearing Conference, the Hearing Officer requested that the parties attempt to resolve the discovery disputes. During a break in the Pre-Hearing Conference, the parties successfully resolved their discovery disputes except as to Interrogatory No. 36. The Hearing Officer heard argument with respect to the Interrogatory No. 36 dispute, and made the following ruling:¹

AT&T in its matrix states that BellSouth, therefore, should either produce the requested data or explain why producing such data is not technically feasible. That is going to be my order. You will either produce the data, or you will produce -- you should either produce the requested data or explain in writing in a filing before us why producing such data is not technically feasible (See pg. 63 of November 8th transcript) (emphasis added).

On November 16, 2001, BellSouth filed its supplemental responses to discovery, including its supplemental response to Item 36. BellSouth had understood that all supplemental discovery responses would be filed on November 16, 2001. Consequently, BellSouth filed its responses, including its supplemental response to Item 36, on November 16th. BellSouth received a copy of the Order after it filed its supplemental responses. BellSouth now understands that the Hearing Officer wanted BellSouth to file its response to his November 8th ruling by

¹ AT&T acknowledged during the argument that it had not even asked for this information in other states. See page 55 of November 8 transcript.

November 13th.² BellSouth apologizes that the response to Item No. 36 was three days late.

This does not change the fact, however, that even assuming it is technically feasible to produce state-by-state flow-through reports, extensive programming efforts would have to be undertaken to develop a report of the type required by the Order. Moreover, BellSouth's supplemental response to Item 36, filed November 16, 2001, complies with the Hearing Officer's Order of November 8th. The Hearing Officer's written Order of November 14, 2001 (but not received by BellSouth until late Friday afternoon, November 16, 2001) is inconsistent with the decision made by the Hearing Officer on November 8th. On November 8th, the Hearing Officer ordered BellSouth to either produce reports or explain why it was not technically feasible to do so in its supplemental response. BellSouth has explained why it is not technically feasible to do so. While there has been confusion regarding the timing of the Order, its receipt by BellSouth, and the filing of data request responses, these occurrences do not change the fact that, contrary to state discovery law, BellSouth has been ordered to create documents which do not exist. *See Soetaert vs. Kansas City Coca Cola Bottling Co.*, 16 FRD 1, 2 (D.C. Mo. 1954) ("Rule 34 cannot be used to require the adverse party to prepare, or cause to be prepared, a writing to be produced for inspection, but can be used only to require the production of things in existence"); *see also* Wright, Miller & Marcus,

² The November 8, 2001 transcript does reflect that the Hearing Officer requested that BellSouth file its supplemental response to Item 36 by November 13, 2001.

Federal Practice and Procedure Civil 2d § 2210, p. 408 ("Production cannot be required of a document no longer in existence nor of *one yet to be prepared*") (emphasis added). Thus, despite the unfortunate chain of events and conclusions drawn therefrom, the November 14th Order is simply legally erroneous in requiring BellSouth to provide documents that do not exist.

In summary, BellSouth respectfully requests that the Order be clarified to conform to the decision rendered by the Hearing Officer on November 8th and that BellSouth's supplemental response to Item 36 be accepted.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.

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CERTIFICATE OF SERVICE

I hereby certify that on November 20, 2001, a copy of the foregoing document was served on counsel for known parties, via the method indicated, addressed as follows:

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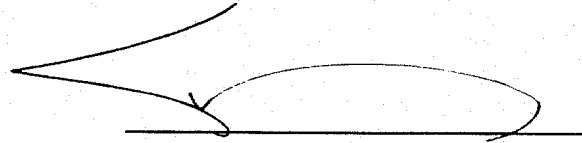
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A handwritten signature in black ink, appearing to read "Jack Robinson", is written over a horizontal line. The signature is stylized with a large, sweeping loop and a sharp, upward-pointing stroke at the end.